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No. 63

IN THE

Supreme Court of the United States

October Term, 1937

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Appellants

v.

W. V. GRIFFIN AND H. W. PURVIS, RECEIVERS FOR GEORGIA & FLORIDA RAILROAD, Appellees

Appeal from the District Court of the United States for the Southern District of Georgia

SUPPLEMENTAL BRIEF ON BEHALF OF W. V. GRIFFIN AND H. W. PURVIS, RECEIVERS FOR GEORGIA & FLORIDA RAILROAD

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On December 13, 1937, this Court held that it had jurisdiction of the appeal in the above entitled cause and ordered a reargument on the merits. Appellees interpret the Court's order to mean that the specially constituted District Court likewise had jurisdiction; otherwise the scope of this Court's jurisdiction would not extend to the merits of the case, but only for the purpose of reversing the decree below with directions

to dismiss, *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10.

Under this order therefore a railroad, aggrieved by an order of the Interstate Commerce Commission fixing rates for the transportation of mail, may bring suit under the Urgent Deficiencies Act to set aside the Commission's order, upon the record made before that administrative agency. Hence it becomes pertinent to inquire into (1) what is the nature of the functions of the Interstate Commerce Commission in mail pay cases and (2) what is the scope of judicial review which the courts may exercise in passing on the validity of the Commission's orders?

1. Nature of Commission's Function in Mail Pay Cases

In fixing mail pay rates the Commission is not acting in the legislative capacity of *regulating* the ordinary freight and passenger rates, but is acting in the capacity of an agent of the Government which is charged with the duty of ascertaining the reasonable value of a service requisitioned by the Government for which there is a duty on the Government to pay just compensation. It acts in a capacity analogous to that in which the Secretary of War or the Secretary of the Navy acts under special statutes in the taking of private property for public use, by which statutes they are authorized to ascertain the fair market value of the property.

While in undertaking to determine the reasonable value of the mail service the Commission will act in

what it conceives to be a judicious and impartial manner, nevertheless the Commission is an administrative agent of the very Government which takes the property or services for public use. In this view it is understandable why, despite the evidence showing that anything less than an increase of 87.40% would result in confiscation, the Commission felt at liberty to balance the inescapable result against considerations not supported by evidence in the record, and to deny any increase.

2. Scope of Judicial Review in Mail Pay Cases

This proceeding, being to ascertain and fix the compensation for a taking by the Government, is in the nature of a condemnation proceeding, and the rules of law limiting the scope of judicial review over ordinary administrative action are inapplicable. The appellees are entitled to a judicial determination of the value of the property taken, both on questions of law and on questions of fact.

(a) The findings of the Commission as to facts cannot be regarded as conclusive, because that would not afford the owner of the property a full and adequate judicial determination of the value of the property taken. This is not a case where it is the Commission's duty to make quasi-legislative findings, but more in the nature of quasi-judicial findings. Under Section 16 of the Interstate Commerce Act, dealing with reparation orders, where the Commission makes quasi-judicial findings between adversary parties, those findings are by statute made *prima-facie* evidence. Here we have a quasi-judicial proceeding,

where the findings are upon a judicial question made by a agent of one of the parties to the controversy. It stands to reason that in such cases it is competent for the courts to weigh the evidence in the record before adopting the Commission's findings.

(b) Nor is the rule applicable here that a court may not fix rates and thus substitute its judgment for that of the Commission. The cases cited by the appellants in support of their Assignment of Error No. 3 are cases where the rate-making was a legislative function, and, of course, it is not within the constitutional power of a federal court to act in a legislative capacity. Here the determination of the rate is a determination of the value of property or service taken for public use. It being a judicial determination, it is competent for a court to find that anything below a given amount would be unfair or unreasonable or even to find that the railroad is entitled to given rates sufficient to produce adequate compensation.

3. Carrier Entitled to Rates Yielding Just Compensation

With these propositions in view, the next question arises whether the rates fixed by the Commission are fair and reasonable. It is evident that the Commission does not squarely contend that the rates established in 1928 are applicable to the appellees because they are the same rates as were fixed for other carriers. Indeed the Commission admits in theory that the appellees are entitled to an increase if the existing rates will result in confiscation as to the appellees themselves.

(Appellant's Brief, pp. 11, 65.) The basic question, then resolves itself into one of fact. What does the evidence in the record show? Appellees believe they have demonstrated in their main brief that upon the evidence they are entitled to an increase of 87.4 per cent.

4. Disposition to be Made of this Case

The last question then arises: What disposition should be made of the case, should this Court find that the court below was right in setting aside the order of the Commission? This controversy has been twice before the Commission and twice before the District Court, and in both instances the District Court avoided making the final finding as to what would constitute a reasonable rate, on the assumption that it had no authority to fix the rates of compensation, and on that theory remanded the cause to the Commission for further proceedings. (R. 30, R. 58.) The Commission, adopting the view that the Court had no authority to fix the compensation, considers the possibility of such cause oscillating indefinitely between the Courts and the Commission. Counsel for appellants say (Appellants' Brief p. 15.):

> "• • • It is interesting to consider whether such shunting of the proceedings between Commission and Court must continue indefinitely until at some time in the future the Commission fixes a rate satisfactory both to the carrier and to the court; if such process can be followed, it would appear that the court is indirectly, but none the less effectively, fixing the rates of mail pay despite its statement that it 'has not the authority to fix the compensation.'" (R. 30.)

Appellees respectfully submit, as indicated above, that the court below was mistaken in the view that it had no authority to fix the compensation. Aside from that, it is to the interest of the parties hereto, and it is in the public interest, that an end be put to this litigation. This Court, if it finds that upon the record the existing rates are confiscatory, can resort to one of two methods of disposing of the case:

(1) It can vacate the order of the District Court and remand the cause with directions to make the findings that anything less than an increase of 87.4 per cent would result in confiscation or that appellees are entitled to rates which will provide an increase of 87.4 per cent, or

(2) This Court may, following its decision in *Los Angeles Gas & Electric Corporation* v. *Railroad Commission of California*, 289 U. S. 287, 77 L. ed. 1180, make its own findings as to facts, and, upon those findings, affirm the decree order of the District Court.

We submit that, in view of the state of the record, the first method will serve no useful purpose. Assuming that this Court will make its own findings, we propose the following as the findings as to the facts in this case:

Proposed Findings as to Facts

I.

By the Railway Mail Pay Act of July 28, 1916 (39 U.S.C. 541), the railroads are required to render

railway mail service at fair and reasonable rates to be determined by the Interstate Commerce Commission. The Act further provides that upon the expiration of six months after an order fixing such rates either the Postmaster General or the carrier may apply for a redetermination of the rates. (*U. S.* v. *New York Central*, 279 U. S. 73, 79.)

II.

Railway mail service required by the Post Office Department is of two distant types: (a) railway postoffices with clerks and (b) storage and closed pouch without clerks. By order of the Interstate Commerce Commission dated December 23, 1919 (56 I.C.C. 1), both types of service are measured and paid for upon a space basis.

III.

In 1928 the Interstate Commerce Commission, upon investigation and cost studies submitted, made an order fixing the rates for the above two types of service, in so far as they are applicable to this case, as follows: (a) For the 15-foot postoffice in a combination car the rate of pay prescribed for all railroads over 100 miles in length, *as a class*, was 14.5 cents per mile; for railroads less than 100 miles, but more than 50 miles in length, *as a class*, the rate prescribed was 27 cents per mile; and for railroads less than 50 miles in length, *as a class*, the rate prescribed was 34 cents per mile. (b) For the closed pouch service the rate of pay prescribed for all railroads over 100 miles in length, *as a class*, was 4.5 cents per mile; for railroads

less than 100 miles, but more than 50 miles in length, *as a class,* was 8 cents per mile; and for all railroads less than 50 miles in length, *as a class,* the rate was 10 cents a mile (144 I.C.C. 675, 718.)

There were some exceptions where the rates were higher for some railroads than for others in the same class.

The rates so prescribed were based upon findings as to the average cost of transporting the mails on all railroads throughout the United States which were covered in that decision.

IV.

The plaintiffs are Receivers of the Georgia & Florida Railroad operating between a point in South Carolina and a point in Florida, traversing a large section of eastern Georgia. (R.289, *Georgia & Florida Reconstruction Loan* 184 I.C.C. 332, 340.) Prior to the proceedings here in issue the rates prescribed for the Georgia & Florida were those fixed by the Commission for railroads over 100 miles in length, *as a class,* namely, (a) 14.5 cents per mile for the 15-foot travelling postoffice service and (b) 4.5 cents per mile for the closed pouch service. (R. 6, R. 10, R. 51.)

V.

On April 1, 1931, the plaintiffs filed a petition with the Interstate Commerce Commission for a separate reexamination and increase in rates of compensation for the mail service required of it by the Government

on and after that date. (R. 21. *U. S.* v. *New York Central*, 279 U. S. 73.)

VI.

Pursuant to precedent, the Post Office Department and the Railroad entered upon a cooperative cost study, upon the standard basis followed and approved by the Commission in all mail pay cases, for the ascertainment of the proportionate part of the expense of railway operation which is properly chargeable to the mail service, and also the proportionate part of railway property used for transportation of the mails. (R. 6, R. 48.)

VII.

A representative test period was agreed upon by the carrier and the Post Office Department, and a space test was conducted on the Georgia & Florida *only* for a period of 28 days extending from September 28 to October 25, 1931, inclusive, under the supervision and direction of a representative of the Post Office Department. (R. 94.)

VIII.

The separations of operating expenses between freight and passenger services were made pursuant to the obligatory rules of the Commission prescribed under Section 20 of the Interstate Commerce Act (R. 258.)

IX.

There were no controversies or disputes between the Post Office Department and the carrier upon any of the figures of the test period. (R. 96.) The Department made a calculation to check the number of car-miles in the test period against the carrier's total car-miles for the entire year, and discovered that the number of car-miles for the test period did not represent 28/365ths of the total number of car-miles actually operated during the year, because the carrier had ceased operating certain of its trains in the early part of 1931, and the mail service formerly carried on those trains had, of course, been discontinued. When the Post Office Department and the carrier came to apply the results of the test period to the full year it was agreed between the parties before the Commission that adjustments be made because of the change in the train service and the elimination of some of the authorized mail routes (R. 122, 123.)

All of the operating and financial statistics were checked by the Post Office Department and the carrier and were agreed upon. (R. 96.)

X.

Pursuant to the rule established by the Commission and always followed, the space in the combination cars in which the mail service is rendered was distributed among the various kinds of passenger service in accordance with what is known as Plan 2 (R. 6, R. 292.) Under said Plan 2, all cars employed exclusively for one service are referred to as full cars, whether loaded or not, and the entire operation of each is allocated

to the service to which it is assigned. The space in combination and mixed cars is allocated to each service according to the space used, except that space authorized for mail is regarded as space used. The unused space in such combination or mixed cars, and that unused space only, is apportioned in proportion to the space used. (R. 6, 7, R. 292, Appellants' Brief, page 32.)

XI.

Substantially all of the evidence in the first hearing consisted of or related to the cost study made on the customary standard basis (R. 6), upon which, after consenting to all adjustments advanced by the Post Office Department, the parties were agreed. (R. 96.) "No other facts were established or sought to be established than those set forth in said order of said Commission * * * the challenge is to the conclusion drawn from the undisputed facts." (R. 29, R. 55.)

XII.

While the Commission did not make separate "Findings of Fact", it embodied the following findings in its report, dated May 10, 1933, applying the results of the cost study by the use of the Plan 2 method to operations for the year 1931:

(a) For the year ended December 31, 1931, the total operating expenses, railway tax accruals, net equipment and joint facility rents were $1,449,801.00;

(b) For the year 1931 the total of operating expenses, railway tax accruals, net equipment and joint

facility rents apportioned to mail was $40,673.00;

(c) The computed deficit in net railway operating income from mail was $4,945.00, representing the excess of apportioned operating expenses over the total mail pay received for the calendar year 1931 of $35,728.00, exclusive of $979.00 for services in motor cars;

(d) The total investment in road, excluding unrelated items was $15,864,462.00. Of this total investment the amount apportioned to mail upon the adjusted space ratio was $438,803.00. The total investment in equipment, less depreciation, allocated to passenger train service, was $135,257.00. Of this amount $18,279.00 was allocated and apportioned to mail service. The total investment in road and equipment allocated and apportioned to mail was $457,082.00;

(e) A return upon this $457.082.00 of investment computed at 5.75 per cent is $26,282.00;

(f) To pay operating expenses apportioned to the mail service and a return of 5.75 per cent upon the investment apportioned to mail service for the year 1931 would require an increase in compensation of $31,227.00;

(g) This increase is the equivalent of an 87.40 per cent increase over the compensation for carrying the mail received by the carrier in 1931. (R. 6, 7.)

XIII.

The Commission concluded, contrary to its findings

of fact stated above in paragraph XII that the rates of pay being received by this carrier for the transportation of mail established in 1928 (*Railway Mail Pay*, 144 I.C.C. 675) for railroads over 100 miles in length, *as a class*, were fair and reasonable for this carrier and denied the application for increased compensation. (R. 10, R. 254.)

XIV.

The plaintiffs filed their petition in United States District Court for the Southern District of Georgia on March 3, 1934, for an order setting aside and annulling the Commission's order of May 10, 1933, fixing its compensation for carrying mail at the same rate as already being received by the carrier under the rates established for lines over 100 miles in length by the order of 1928. (R. 1.)

XV.

No other facts were established or sought to be established before the District Court than those set forth in the report of the Commission. (R. 29, R. 55.) The District Court adopted the findings of fact of the Commission, but held that, upon the Commission's own findings, the Commission's conclusion that existing rates of mail pay were fair and reasonable was errorneous. (R. 30.) The District Court set aside and annulled the Commission's order, and remanded the case for further proceedings.

XVI.

The Commission re-opened the proceedings for

further hearing on March 12, 1935, and at such further hearing additional evidence was presented. (R. 32.)

XVII

The Commission in its second report dated February 4, 1936, reiterated the findings made in its first report and set forth in pargraph XII hereof. The Commission, however, stated its reasons for again reaching the conclusion that the 1928 rates were fair and reasonable as applied to this carrier. (R. 47.)

XVIII.

The plaintiffs filed a supplemental bill on June 30, 1936 (R. 31, R. 1.), seeking to set aside and annul said second order of the Commission. (R. 35.)

XIX.

The District Court granted the relief sought by the plaintiffs and again remanded the cause to the Commission for further proceedings. (R. 55.)

XX.

From the decree entered by the District Court, the United States and the Interstate Commerce Commission prosecuted this appeal. (R. 305.)

XXI.

The findings of the Commission set forth in paragraph XII hereof, being supported by evidence, and having been twice adopted by the District Court, are now adopted by this Court.

XXII.

The findings set forth in paragraph XII hereof support the conclusion that any rate less than an 87.40 per cent increase over the existing rates results in confiscation, and that the plaintiffs are entitled to have their rates of pay increased by 87.40 per cent, unless the reasons given by the Commission for the contrary conclusion it reached are supported by findings and evidence and the District Court erred in overruling the Commission.

XXIII.

Combining both its first and second decisions, the Commission assigns seven reasons for denying any increase to this railroad and for holding it to the rates of mail pay heretofore prescribed, viz., that:

1. "The cost computed in the manner described is a hypothetical cost and not an actual cost, and is not necessarily conclusive as applicant contends" (R. 44). * * * "The method by which total expense for passenger-train service was computed also results in a hypothetical and not an actual cost" (R. 46).

2. "Applicant receives the same rates as those received by other roads for the same kind of service" (R. 9, 10.)

3. "A comparison of revenue received by applicant from the three services rendered in passenger-train service shows that the mail service pays considerably more for equivalent units of service than passenger proper, or express" (R. 48).

4. "In the space study the extra 15 feet of space was added to unoccupied space in the combination car • • • It results in the operation of an amount of unused space equal to the authorized 15-foot apartment and thus increases the amount of space and the expense apportioned to mail" (R. 45).

5. "If adjustment in the computed data were made to reflect the actual use of the 3-foot units, the actual car-foot miles of mail service probably would be less than the authorized and the unit revenue per car-foot mile from mail would be somewhat greater" (R. 50).

6. "The average revenue per car-foot mile of authorized mail service was 1.0297 cents which was 56 per cent in excess of the average computed expense for passenger-train service as a whole for all space operated" (R. 49).

7. "The methods used in this, as in all prior railway-mail proceedings, to ascertain and compute the proportions of operating expense and the separations into expenses for freight service and passenger service, respectively, show that the portion assigned to either service may change due solely to changes in the other." (R. 48.)

XXIV.

1. Probative Value of Cost Study

As to the first reason assigned by the Commission, the District Court held: "Neither applicant nor

this Court entertains the view that the hypothetical cost is 'necessarily conclusive.' It is merely the fairest method that has been devised. If 'actual cost' as to each item be required applicants would be helpless and the Commission would be reduced to guessing. What elements may have been persuasive 'In other mail proceedings' are not necessarily to be considered here, and should not be in the absence of supporting testimony and some indication as to what weight was given each element."

This Court concurs in this holding and further finds that this reason assigned by the Commission appears merely as an after-thought. Instead of treating this method as hypothetical, the Commission treated it in its first report as an appproximation of costs. Furthermore, this method of determining costs had been adopted and followed by the Commission in previous proceedings of this character. (*New England Railway Mail Pay*, 85 I.C.C. 157, 179; *Railway Mail Pay of Woodstock Railway Company and White River Railroad Company*, 96 I.C.C. 43, 46; *Winston-Salem Southbound Railway Mail Pay*, 123 I.C.C. 33, 40; *Railway Mail Pay*, 144 I.C.C. 675, 691.) In this case, as in all similar proceedings. "it is approximate correctness that is required and not mathematical exactitude." *Baltimore & Ohio Railroad Company* v. *United States*, 298 U. S. 349, 378.

2. Comparisons with Other Railroads

The second reason assigned by the Commisison the District Court held was irrelevant:

"The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical conditions, at a profit or that this railroad belonged in a certain classification established by such Commission, known as Class 1 railroads and that therefore it should be in accord with other railroads of such Class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does not equal the cost of doing so." (R. 30.)

This Court agrees with the District Court.

3. Comparisons with Other Services of this Carrier

The answer of the District Court to this reason is embraced in the above quoted answer to the second reason. In its second opinion the District Court added:

"The law as established in this case by the previous decision, unreversed, makes inapplicable 'comparisons with compensation received from other services in passenger train cars;' 'comparisons with freight rates;' and 'comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole.'" (R. 57.)

4. Use of Thirty Foot Compartments

In answer to the fourth reason the District Court said:

"Further argument of the Commission, as we understand it, is that because 30 feet instead of 15 feet is partitioned off for mail this adds 15 feet to the unused space for which the Post Office Department pays a part. We do not so understand the testimony. Our understanding is that the unused space is the same wherever the partition be placed.

"There is however this further finding of fact implied, though not definitely stated, viz: that an unnecessarily large car is used and this adds to the portion paid by the mail for unused space and that if 15 feet were eliminated from the car the mail space ratio would be reduced to 10.79 per cent, resulting in a profit to applicant from mail of $1,711." (R. 57, 58.)

In other words, this reason, if it were a finding supported by evidence, might lead to the conclusion that while the existing rate is confiscatory, the carrier may not be entitled to an increase of 87.40 per cent. This Court holds that findings must be express and cannot be supplied by implication. (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 295 U. S. 193, 202.) Assuming, however, that the finding was express, there is no evidence in the record to support such a finding. The record shows on one occasion, March 14, 1935, several years subsequent to the period when the cost study was made in 1931, a 30-foot apartment car was being operated on an authorization for only 15 feet of railway postoffice (R. 258), but there is nothing in the record to show that this was the fact in 1931, or, if it had been so, that such a fact would operate in any way to increase the amount of space chargeable to the mail in the cost study.

5. Maximun Use of Space Units

The fifth reason is negatived by the Commission's own finding that "the difference in the result of the test period would not be great because of the small amount of closed pouch space in relation to the total in the test period" (R. 9). The Record shows that only five per cent of the total mail service rendered by this carrier was in 3-foot closed pouch units (R. 50). Furthermore, the reason assigned by the Commission is predicated on the assumption that each 3-foot space unit would be loaded to its maximum capacity of 56 sacks (R. 47-8). That would be most extraordinary; at any rate there is nothing in the record to show, and the Commission does not find, that when the Commission prescribed the 3-foot unit as the smallest authorized unit it was predicated upon the theory that it would always be used to full capacity. Nor is that condition peculiar to minimum 3-foot units. Pay for seven feet is required whenever the 3-foot maximum of 56 sacks or the equivalent is exceeded. (*Railway Mail Pay,* 56 I.C.C. 1; *Railway Mail Pay,* 95 I.C.C. 493, 496.) The record does show that during the test period the number of sacks or equivalent in packages handled in the 3-foot closed pouch units was substantially less than that quantity (R. 47-8).

6. Elimination of all Unused Space

The record contains an exhibit in which a computation is made to show that if no unoccupied space was charged to mail the revenue per car-foot mile upon the

number of feet of authorized space would more clearly approach the amount needed to pay the expense of and a return upon the property used in railway mail service. (R. 287.)

There is also a counter exhibit showing that, on the same theory, if all unoccupied space was likewise eliminated from other passenger services, the revenue per car-foot mile from other passenger services would be greatly in excess of the revenue per car-foot mile from mail services. (R. 288.)

The District Court correctly rejected this reason assigned by the Commission, saying:

> "Lengthily are theories and possibilities advanced to establish that a different result might be reached if different methods were employed 'to ascertain and compute the proportions of operating expense and the separations into expenses for freight service and passenger service respectively, but there is no justification submitted for abandoning the method employed in making the first report, which was unchallenged as to accuracy and was admitted to have been apportioned' in accordance with the formulas prescribed for Class I roads for the separation of expenses between freight and passenger services.
>
> "The second report not only does not contradict this but reaffirms it in this language: 'The methods are the same as those prescribed in our rules governing separation of such expenses on large steam railroads.'" (R. 58.)

Furthermore, as already shown in the answer to the first reason, the method of making the cost ascertain-

ment in this case is the same which has been followed by the Commission in all previous cases; and, as shown in paragraph X hereof, particularly is this true of the method for the distribution of unoccupied space between mail service and other passenger services. (R. 6, 7, *Railway Mail Pay*, 144 I.C.C. 675, 681.)

7. Effect of Possible Future Changes

The answer of the District Court to the sixth reason applies equally to the seventh reason assigned by the Commission. Furthermore, there is nothing in the record to show what would be the result of a change either way in the use of space by any of the different services, while the record does show that a period for the test was selected by the parties as being fairly representative of actual conditions, and nothing appears in the record to indicate that either party is unwilling to consider that test as fairly representative then or now (R. 48, 96). If and when substantial changes take place so as to warrant either the Postmaster General or the carrier to apply for a reexamination and redetermination of any mail rate, the statute provides such remedy to be availed of at any time after the expiration of six months from the previous rate determination.

XXV.

None of the reasons stated by the Commission for disregarding the findings contained in paragraph XII hereof are sufficient in law or in fact. This Court, therefore, finds that this carrier is entitled to an in-

crease of its mail pay rates by 87.40 per cent to insure fair and reasonable compensation, and that any rates below such increase of 87.40 per cent results in confiscation.

Respectfully submitted,

January 3, 1938.

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SUPREME COURT OF THE UNITED STATES.

No. 63.—October Term, 1937.

The United States, et al., Appellants, *vs.* W. V. Griffin, et al., Receivers.	Appeal from the District Court of the United States for the Southern District of Georgia.

[February 28, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

The sole question requiring decision is one of statutory construction: The Railway Mail Pay Act of July 28, 1916, c. 261, § 5, 39 Stat. 412, 425, 430, provides that the Interstate Commerce Commission "shall establish by order a fair, reasonable rate or compensation to be received" by railroads for carrying the mail;[1] and authorizes the Commission to modify the order upon a "re-examination." The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (amending Act of June 18, 1910, c. 309, 36 Stat. 539) declares that district courts shall have jurisdiction "of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission." May suit be brought under the Urgent Deficiencies Act to set aside an order refusing, upon "re-examination", to increase the allowance for railway mail compensation theretofore made to this carrier?

The suit was brought, under the Urgent Deficiencies Act, in the federal court for southern Georgia, by the receivers of the Georgia & Florida Railroad against the United States and the Interstate Commerce Commission, to set aside an order made May 10, 1933,

[1] "The Postmaster General is authorized and directed to adjust the compensation to be paid to railroad companies for the transportation and handling of the mails and furnishing facilities and services in conjunction therewith upon the conditions and the rates hereinafter provided." (39 U. S. C. § 523.)

"All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." (39 U. S. C. § 541.)

under the Railway Mail Pay Act, *Railway Mail Pay, Georgia & Florida R. R.*, 192 I. C. C. 779; and to grant a permanent injunction. By that order the Commission had denied upon a "re-examination" an application further to increase the compensation allowed by the order of July 10, 1928. *Railway Mail Pay*, 144 I. C. C. 675. The 1928 order had, upon a "re-examination", increased the compensation originally fixed by order of December 23, 1919. *Railway Mail Pay*, 56 I. C. C. 1. As grounds for setting aside the order of May 10, 1933, the receivers alleged, among other things, that the order was unlawful, because the finding that the existing rates were fair and reasonable was without evidence to support it and contrary to the evidence and that the order will violate the Fifth Amendment by taking property without just compensation.

The jursdiction of the court was not challenged; and the case was heard by three judges on the merits. A decree was rendered setting aside as unlawful the order of May 10, 1933, and directing the Commission to take further action. Additional hearings were then had by the Commission; and on February 4, 1936, it again declined to order any increase over that which had been allowed July 10, 1928. *Railway Mail Pay, Georgia & Florida R. R.*, 214 I. C. C. 66. The last order of the Commission was assailed by a supplemental bill on the same grounds as that assailed in the original bill. The jurisdiction of the court was not challenged; the case was again heard on the merits by three judges; and a decree was entered setting aside the order of February 4, 1936, and directing the Commission to take "such further action in the premises as the law requires in view of the annulment and setting aside of" the order.

From that decree the United States and the Interstate Commerce Commission have appealed to this Court. Here, although answering to the merits, they challenged the jurisdiction of the District Court. Since lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, we must upon this appeal examine the contention; and, if we conclude that the District Court lacked jurisdiction of the cause, direct that the bill be dismissed. *United States* v. *Corrick*, 298 U. S. 435, 440. We at first thought that the District Court had jurisdiction, and ordered a reargument of the case on the merits. But, upon further consideration of the jurisdictional question, we are of opinion that the remedy provided by the Urgent Deficiencies Act is not applicable to this order.

First. The Railway Mail Pay Act, terminated the system theretofore prevailing of service under voluntary contracts.[2] As embodied in United States Code, Title 39, Sections 523 to 568, it provides in forty-six sections comprehensively for the character, means and methods of mail transportation; defines the authority of the Postmaster General; and describes the obligations of the railroads and their right to compensation, which is to be fixed by the Commission.

"The Interstate Commerce Commission is hereby empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the services connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing." (39 U. S. C. § 542.)

"For the purpose of determining and fixing rates or compensation hereunder the Commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification." (39 U. S. C. § 549.)

"At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation for inland transportation by railroad routes such rate or compensation." (39 U. S. C. § 551.)

Eleven sections of the act deal with the procedure on hearings before the Commission.[3] No provision is made for a judicial review.

[2] Prior to the Act of 1916, the carriage of mail by railroads—with the exception of some aided by land grant—was held to be not compulsory "at adequate compensation to be judicially determined", Atchison, Topeka & Santa Fe Ry. *v.* United States, 225 U. S. 640, 650, but under contracts voluntarily entered into with the Postmaster General. New York, New Haven & Hartford R. R. *v.* United States, 251 U. S. 123, 127. For the legislation prior to 1916 concerning compensation of railroads for carrying the mail, see Railway Mail Pay, 56 I. C. C. 1, 3-7. For the several proposals prior to 1916 to modify the laws governing such transportation, see Report of Postmaster General to Congress August 12, 1911, H. R. Doc. 105, 62d Congress, 1st Session; Senate Bill 7371, House Bill 23,721, 62d Congress, 2d Session; Railway Mail Pay, Report of Joint Committee on Compensation for the Transportation of the Mail, August 31, 1914, H. R. Doc. 1155, 63d Congress, 2d Session; Senate Bill 6405, House Bill 17042, 63d Congress, 2d Session; Senate Bill 4175, House Bill 10242, 64th Congress, 1st Session.

[3] Section 544 provides: "The procedure for the ascertainment of the rates and compensation shall be as provided in sections 545 to 554 of this title;"

But provision is made for administrative review by "re-examination" of an order.

"Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a re-examination and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein." (39 U. S. C. § 553.)

There have been many administrative reviews by "re-examination."[4] The case at bar appears to be the only instance in which an attempt has been made to set aside a mail order by suit under the Urgent Deficiencies Act.

Second. The Urgent Deficiencies Act provides a method of judicial review of orders of the Interstate Commerce Commission possessing the following extraordinary features: (1) The original hearing in the district court is not before a single judge, but before three, of whom one must be a circuit judge; (2) From the decree of the district court as so constituted a direct appeal to the Supreme Court is granted as of right, instead of a review by a circuit court

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and § 554 provides: "For the purposes of Sections 524 to 568 of this title the Interstate Commerce Commission is hereby vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers."

[4] The first order fixing compensation for transportation of mail was made by the Commission December 23, 1919. Railway Mail Pay, 56 I. C. C. 1. By it rates were fixed on the general system of flat rates on a space basis, with higher rates for certain short lines less than 100 miles in length. Since then the Commission has made orders on applications for re-examination under 39 U. S. C. § 553, in many cases. Railway Mail Pay, New England Lines, 85 I. C. C. 157, on reargument, 95 I. C. C. 204, 104 I. C. C. 521; Railway Mail Pay, Certain Intermountain and Pacific Coast Short Line Railroads, 95 I. C. C. 493, on reargument, 104 I. C. C. 521; Railway Mail Pay, Woodstock Ry. Co. et al., 96 I. C. C. 43, on reargument, 104 I. C. C. 521; Railway Mail Pay, Canadian Nat. Ry. et al., 109 I. C. C. 13; Railway Mail Pay, Alabama, Tenn. & No. Ry., 112 I. C. C. 151; Railway Mail Pay, Certain Intermountain and Pacific Coast Short Line Railroads, 120 I. C. C. 439, on reconsideration, 151 I. C. C. 734; Railway Mail Pay, Winston-Salem Southbound Ry., 123 I. C. C. 33; Railway Mail Pay, 144 I. C. C. 675; Railway Mail Pay, 151 I. C. C. 734; Railway Mail Pay, Georgia & Florida R. R., 192 I. C. C. 779, on rehearing, 214 I. C. C. 66.

A number of other decisions relating to railway mail pay have also been made. Railway Mail Pay, Certain Short Lines, 165 I. C. C. 774; Railway Mail Pay, Jacksonville & H. R. R. et al., 174 I. C. C. 781; Railway Mail Pay, Illinois Terminal Co., 174 I. C. C. 796; Railway Mail Pay, Macon, D. & S. R. R. et al., 185 I. C. C. 715; Railway Mail Pay, N. J. & N. Y. R. R., 198 I. C. C. 504; Railway Mail Pay, Piedmont & No. Ry., 216 I. C. C. 467.

Similar orders have been entered under the Electric Railway Mail Pay Act, 40 Stat. 742, 748. Electric Railway Mail Pay, 58 I. C. C. 455; Electric Railway Mail Pay, 98 I. C. C. 737. Compare Transmission of Mail by Pneumatic Tubes in the City of New York, 85 I. C. C. 207.

of appeals; (3) Upon both the trial court and the Supreme Court rests the obligation to give the case precedence over others. These features were first introduced by the Expediting Act of 1903, 32 Stat. 823, for suits by the United States to enforce the antitrust and commerce laws. They were extended by the Hepburn Act of 1906, § 5, 34 Stat. 584, 590, 592, to suits to enforce or to set aside orders of the Interstate Commerce Commission. When that jurisdiction was vested in the Commerce Court provisions with like effect were provided for cases coming before it. 36 Stat. 539. To its jurisdiction the district court succeeded, with these features, under the Urgent Deficiencies Act.

In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation. In construing the Act, this Court concluded that despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission. For substantially every decision, and every other kind of action by the Commission is expressed in, or is followed by, an order; and many of the orders are obviously not of such public importance and widespread effect as to justify, in cases affecting them, the extraordinary features of the Urgent Deficiencies Act.

The Commerce Court had (36 Stat. 539) jurisdiction "over all cases of the following kinds":

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission. . . ."

This Court concluded that, as the intent of Congress was "to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal", there was jurisdiction to set aside only those kinds of orders which there was jurisdiction to enforce; that a distinction must be drawn between "affirmative" and "negative" orders; and that jurisdiction under the Commerce

Court Act was applicable only to "affirmative" orders. *Proctor & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302. Since the abolition of the Commerce Court, that rule has been consistently followed in cases brought under the Urgent Deficiencies Act. *Lehigh Valley R. R.* v. *United States,* 243 U. S. 412; *Piedmont & Northern Ry.* v. *United States,* 280 U. S. 469; *Standard Oil Co.* v. *United States,* 283 U. S. 235; *United States* v. *Corrick,* 298 U. S. 435. Compare *Delaware Hudson Co.* v. *United States,* 266 U. S. 438; *United States* v. *Los Angeles & Salt Lake R. R.,* 273 U. S. 299.

The order of February 4, 1936, here assailed, does not command either the Government or the Railroad to do anything. It is simply a refusal, upon a second "re-examination" of the order of July 11, 1928, further to increase the compensation thereby awarded upon a "re-examination" of the compensation originally awarded by the order made December 23, 1919. The order assailed, being a refusal to change the existing status, was a "negative" order. The District Court lacked jurisdiction to set it aside, and should have dismissed the bill.

Third. Congress cannot be assumed to have made the extraordinary remedy of the Urgent Deficiencies Act applicable for the determination of the validity of railway mail pay orders, even if "affirmative". The issue here is whether the existing mail revenue of $35,728 should be increased for the year by $31,227. There is no wide public interest in its speedy determination. There is no danger of temporarily interrupting the mail service through the improvident issue of an injunction by a single judge. Only the method or amount of payments currently to be made would be affected. Such orders are in character unlike those under the Boiler Inspection Act, 36 Stat. 913, as amended, 38 Stat. 1192, 43 Stat. 659, and the Inland Waterways Corporation Act, 43 Stat. 361, as amended, 45 Stat. 978, 48 Stat. 968, of which jurisdiction was taken although the statutes contained no provision for judicial review.[5]

In *Great Northern Ry.* v. *United States,* 277 U. S. 172, we held that there was not jurisdiction under the Urgent Deficiencies Act of a suit to set aside an order of the Interstate Commerce Commis-

[5] Baltimore & Ohio R. R. *v.* United States, 293 U. S. 454; United States *v.* Illinois Central Ry., 291 U. S. 457; compare Mississippi Valley Barge Line Co. *v.* United States, 292 U. S. 282.

sion made under Title II of the Transportation Act of 1920 determining the amount due a railroad on the Government's guaranty of income for the period following relinquishment of federal control. And in *United States* v. *Los Angeles & Salt Lake R. R.*, 273 U. S. 299, we held that there was not jurisdiction under the Urgent Deficiencies Act of a suit to set aside a final order under the Valuation Act, even though that statute was enacted as an amendment to the Interstate Commerce Act itself. 37 Stat. 701, as amended, 41 Stat. 456, 474, 493, 42 Stat. 624.[6]

In recent years the field of administrative determination has been widely extended; and the duty of making many of these determinations has been imposed upon the Interstate Commerce Commission.[7] Some of the statutes contain specific provision making applicable jurisdiction under the Urgent Deficiencies Act. This is true of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 216, as amended, 49 Stat. 376, and of the Motor Carrier Act of ~~1933~~ 1935, 49 Stat. 543, 550. Compare Transportation of Explosives Act (Criminal Code, § 233), 35 Stat. 554, 555, as amended,

[6] Compare United States *v.* Illinois Central Ry., 244 U. S. 82; Delaware & Hudson Co. *v.* United States, 266 U. S. 438; United States *v.* Atlanta, B. & C. Ry., 282 U. S. 522.

[7] Among the statutes delegating to the Commission administrative duties in addition to those which it performs under the Interstate Commerce Act are: *Postal Service:* Railway Mail Pay Act, 39 Stat. 412, 425, 430; Electric Railway Mail Pay Act, 40 Stat. 742, 748; New York City Pneumatic Tube Mail Pay Act, 42 Stat. 652, 661; Fourth Class Mail Regulations Act, 43 Stat. 1053, 1067, as amended, 45 Stat. 940, 942; Air Mail Act, 48 Stat. 933, 935, as amended, 48 Stat. 1243, 49 Stat. 614. *Railroad Operation:* Safety Appliance Act, 27 Stat. 531, as amended, 32 Stat. 943, 36 Stat. 298; Boiler Inspection Act, 36 Stat. 913, 914, as amended, 38 Stat. 1192, 43 Stat. 659; Locomotive Ash Pan Act, 35 Stat. 476; Accident Investigation Act, 36 Stat. 350, 351; Hours of Service Act, 34 Stat. 1415; Railway Labor Act, 44 Stat. 577, as amended, 48 Stat. 1185, 49 Stat 1189; Transportation Act of 1920, Title II, 41 Stat. 456, 457, as amended, 44 Stat. 1450; Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 216, as amended, 49 Stat. 376. *Railroad Finance:* Clayton Antitrust Act, 38 Stat. 730, 734, as amended, 43 Stat. 939, 48 Stat. 1102; Reconstruction Finance Corporation Act, 47 Stat. 711, as amended, 48 Stat. 20, 99, 120, 1109, 49 Stat. 1, 796, 50 Stat. 5, 357; Bankruptcy Act § 77, 47 Stat 1474, as amended, 49 Stat. 911, 1969. *Miscellaneous:* Transportation of Explosives Act (Criminal Code, § 233), 35 Stat. 554, 555, as amended, 35 Stat. 1088, 1135, 41 Stat. 1445; Standard Time Zone Act, 40 Stat. 450; St. Louis Bridge Act. 43 Stat. 7, 8; Inland Waterways Corporation Act, 43 Stat. 360, as amended, 45 Stat. 978, 48 Stat. 968, 49 Stat. 958; Radio Act of 1927, 44 Stat. 1162, 1173, superseded by 48 Stat. 1064; Motor Carrier Act of ~~1935~~ 1935, 49 Stat. 543, 550.

Although enacted as Part II of the Interstate Commerce Act, the Motor Carrier Act of ~~1935~~ 1935 is included in this list because it seems more properly classified as a complete and independent statute than as merely an amendment to the Act of 1887.

35 Stat. 1088, 1135, 41 Stat. 1445. It is true likewise of several statutes under which the determinations are to be made by other administrative tribunals. Shipping Act of 1916, 39 Stat. 728, 738, superseded by 49 Stat. 1985 (United States Shipping Board); Packers & Stockyards Act of 1921, 42 Stat. 159, 168 (Secretary of Agriculture); Perishable Agricultural Commodities Act of 1930, 46 Stat. 531, 535 (Secretary of Agriculture); Emergency Railroad Transportation Act of 1933, *supra* (Federal Coordinator of Transportation); Communications Act of 1934, 48 Stat. 1064, 1093, as amended, 50 Stat. 189 (Federal Communications Commission).[8] The orders for which review is provided by each of these statutes are like the orders under the Interstate Commerce Act fixing rates payable by shippers. Improper injunctive relief of such orders or delay in final determination of their validity may seriously affect the public interest by preventing or obstructing action under those statutes.

While the compensation fixed in a railway mail pay order is ordinarily measured by a rate, the ultimate question determined by the Commission is, as in the *Great Northern* case, the proper compensation to be paid by the Government to the railroad for services and the use of its property—the *quantum meruit* for carrying the mail. There is nothing in the history of the Railway Mail Pay Act which requires that the Urgent Deficiencies Act be made applicable to the determination of the validity of such orders.[9]

Fourth. The absence in the Railway Mail Pay Act of a provision for judicial review and the denial of jurisdiction under the Urgent

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[8] Compare Merchant Marine Act of 1936, 49 Stat. 1985, 1987 (United States Maritime Commission). A similar procedure has also been provided for certain suits to enjoin the enforcement or operation of state and federal statutes on the ground that they are unconstitutional. Judicial Code, § 266, 36 Stat. 557, 1162, as amended, 37 Stat. 1013, 43 Stat. 938; Judiciary Act of 1937, 50 Stat. 751, 752.

[9] The provision calling for the Interstate Commerce Commission to fix the rates at which the mail is to be carried was introduced in the Senate as an amendment to the bill by Senator Cummins of Iowa. In answer to questions as to "whether the amendment provides for an appeal in this case as in other rate-making cases before the Interstate Commerce Commission", he stated: "I think it would permit the same review. . . . There would be the same remedy precisely under my amendment for the railway companies that now exists in the case of the establishment of a rate for a private shipper. . . . It is provided for in just the same way the present law does." 53 Cong. Rec., 9694-95. No further reference to judicial review occurs in the debates on this provision in either House; and no reference to judicial review was made in the report of the Committee of either House, nor in that of the Conference Committee whose recommendations were adopted. See Sen. Rep. 459, H. R. Rep. 91, H. R. Rep. 981, 64th Cong., 1st Sess.

Deficiencies Act do not preclude every character of judicial review. If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress. *Missouri Pacific R. R.* v. *United States,* 271 U. S. 603. Compare *United States* v. *New York Central R. R.,* 279 U. S. 73, affirming 65 Ct. Cl. 115, 121.[10] And since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory. *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645; *North American Transportation and Trading Co.* v. *United States,* 253 U. S. 330, 333; *Jacobs* v. *United States,* 290 U. S. 13, 16. Moreover, as district courts have jurisdiction of every suit at law or in equity "arising under the postal laws", 28 U. S. C., § 41 (6), suit would lie under their general jurisdiction if the Commission is alleged to have acted in excess of its authority, or otherwise illegally. Compare *Powell* v. *United States,* 300 U. S. 276, 288, 289. But a suit under the Urgent Deficiencies Act to set aside an order concerning mail pay is not primarily one against the Commission. Primarily, it is a suit against the United States.[11] And the United States can be sued only when authority so to do has been specifically conferred. The Railway Mail Pay Act does not confer that authority.

Decree reversed—with direction to the District Court to dismiss the bill without costs to either party.

Mr. Justice BLACK agrees with the result and fully with all of the opinion except paragraph *Fourth*.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

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[10] Other decisions of the Court of Claims under the Railway Mail Pay Act of 1916 are: Chicago & E. I. Ry. *v.* United States, 63 Ct. Cl. 585; Nevada County N. G. R. R. *v.* United States, 65 Ct. Cl. 327; Chicago & E. I. Ry. *v.* United States, 72 Ct. Cl. 407; Macon, D. & S. R. R. *v.* United States, 78 Ct. Cl. 251; 79 Ct. Cl. 298. Compare Pere Marquette Ry. *v.* United States, 59 Ct. Cl. 538; New Jersey & N. Y. R. R. *v.* United States, 80 Ct. Cl. 243.

[11] Compare Judicial Code § 211, 36 Stat. 542, 1150, as amended. 38 Stat 219, 28 U. S. C. § 48; Lambert Run Coal Co. *v.* Baltimore & Ohio R. R., 258 U. S. 377, 382.